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Supreme Court of the United States

OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, APPELLANT,

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 12, 1954

PROBABLE JURISDICTION NOTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, APPELLANT,

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JOHN W. PECK, TAX COMMISSIONER OF OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fols. 1-5] **IN THE SUPREME COURT OF OHIO**

No. 33,523

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellee

vs.

JOHN W. PECK, TAX COMMISSIONER OF OHIO, Appellant

ORDER ALLOWING APPEAL—Filed June 3, 1954

Society for Savings in the City of Cleveland having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment of this Court in this cause entered on March 10, 1954, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

[fols. 6-7] Therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law, and that the clerk of this Court shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, so that the same may be deposited with said Court within forty (40) days of this date.

Carl V. Weygandt, C. J.

Dated June 3, 1954.

[fol. 8] IN THE SUPREME COURT OF OHIO

No. 33,523

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 3, 1954

Society for Savings in the City of Cleveland, appellee in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following Assignment of Errors upon which it will rely in its prosecution of said appeal from the final judgment of the Supreme Court of Ohio entered on March 10, 1954; application for rehearing denied, March 31, 1954.

The Supreme Court of Ohio erred:

[fols. 9-39] 1. In holding that the Tax Commissioner of Ohio, in ascertaining and assessing for taxation the value of the property representing the capital employed by an incorporated mutual savings bank, not divided into shares, pursuant to Sections 5408 and 5412, Ohio General Code, is not required, by the force of United States Code, Title 31, Section 742 (Revised Statutes, Sec. 3701), Article I, Section 8, Clause 2 of the Constitution of the United States, and Article VI, Clause 2 of the Constitution of the United States, to eliminate from the tax base, the value of federal securities owned by such institution; and in holding that the Ohio statutes as so interpreted are not violative of the federal statute and Constitution as aforesaid.

3. In holding that to so tax a mutual savings bank, construing the tax as assessed against property of the bank's depositors, without right of reimbursement by the bank against its depositors, is not a deprivation of property without due process of law, under the Fourteenth Amendment of the Constitution of the United States.

Wherefore, appellee, Society for Savings in the City of Cleveland, prays that the final judgment of the Supreme Court of Ohio be reversed, and for such other relief as the

Supreme Court of the United States may deem fit and proper.

Charles W. Sellers, 1100 National City Bank Bldg., Cleveland 14, Ohio, and Jerome C. Fisher, 1100 National City Bank Bldg., Cleveland 14, Ohio, Thompson, Hine & Flory, 1100 National City Bank Bldg. Cleveland, Ohio, of Counsel. Counsel for appellee Society for Savings in the City of Cleveland.

[fol. 40] BEFORE THE DEPARTMENT OF TAXATION

In the Matter of the Application of Society for Savings in the City of Cleveland, Cleveland, Ohio a Financial Institution, for a Certificate of Abatement for the Alleged Overpayment of Intangible Taxes for the Years 1947 Through 1951.

APPLICATION FOR CERTIFICATE OF ABATEMENT—Filed June 3, 1952

Tax Commissioner
Ohio Department of Taxation
Columbus, Ohio:

Applicant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, the capital of which is not divided into shares, and which has no capital stock. It was originally incorporated pursuant to a special act of the Ohio legislature passed in 1849 (47 O. L. 279), supplemented by acts of the Ohio legislature passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148a to 710-148l, inclusive, of the Ohio General Code, by filing its certificate of election pursuant to Section 710-148k of the Ohio General Code. Applicant's office and place of business is located at 127 Public Square, Cleveland, Ohio.

Application is hereby made for issuance of a certificate of abatement pursuant to Section 1464-3, Ohio General Code, in the amount of $126,115.96.

[fol. 41] Applicant's financial institutions tax returns, for

the years 1947 to 1951, inclusive, each included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by applicant. The amounts of such obligations of the United States, so included in the tax returns for each year were as follows:

Year	Book Value of United States Obligations
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

Including book value of United States obligations as aforesaid, the book value of applicant's capital employed, as showed in the tax returns for the several years referred to, was as follows:

Year	Book Value of Capital Employed
1947	$12,760,230.00
1948	12,797,790.00
1949	11,849,160.00
1950	12,421,520.00
1951	13,229,280.00

The financial institutions tax assessed against, and paid by, applicant in respect of its capital employed (exclusive of the tax on deposits) or each said years, and the dates of payment are as follows:

[fol. 42]

Year	Amount of Tax Paid	Date of Payments
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
Total	$126,115.96	

The book value of the United States obligations, owned by applicant as aforesaid, should have been excluded from its resources for purposes of computing the financial institutions tax, for the reason that said obligations of the United States, owned by applicant may not, pursuant to the terms and provisions of the Constitution of the United States and Title 31, Section 742 of the United States Code be taxed by the state of Ohio. Such exclusion would have left none of applicant's capital employed subject to the tax, for each of the years 1947-1951, inclusive. Consequently, the entire amount of tax paid for said years as aforesaid, to wit, $126,115.96, was overpaid, and applicant is entitled to a certificate of abatement for the same.

Society for Savings in the City of Cleveland, by Thompson, Hine & Flory, Attorneys.

[Duly verified.]

[fol. 43] BEFORE THE DEPARTMENT OF TAXATION

ORDER DENYING APPLICATION—Dated July 30, 1952

This day the application of Society for Savings in the City of Cleveland, Cleveland, Ohio, a financial institution, for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951 came on to be considered.

The taxpayer filed a timely application for a certificate of abatement for the years above mentioned contending that the taxes for said years were overpaid because the assessments included obligations of the United States. The Tax Commissioner finds that the application is based upon the provisions of Section 742, Title 31, United States Code.

Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application be and the same hereby is denied.

Department of Taxation, John W. Peck, Tax Commissioner.

[fol. 44] BEFORE THE DEPARTMENT OF TAXATION

AGREED STATEMENT OF FACTS—Filed November 12, 1952

The parties hereto, by their counsel duly authorized, hereby stipulate and agree that the following facts are true:

Appellant, Society for Savings in the City of Cleveland, is an incorporated financial institution, a mutual savings bank, which has no capital stock. It was originally incorporated pursuant to a special act of the General Assembly of Ohio passed in 1849 (47 O. L. 279), supplemented by acts passed in 1866 (63 O. L. 62) and in 1877 (74 O. L. 26). It reincorporated in the year 1933, as a mutual savings society, pursuant to Sections 710-148 a to 710-148 l, inclusive, General Code, by filing its certificate of election pursuant to Section 710-148 k, General Code. Appellant's office and place of business are located at 127 Public Square, Cleveland, Ohio.

Each of appellant's financial institution tax returns for the years 1947 to 1951, inclusive included in its statement of resources under Item 3 thereof, the book value of United States bonds, treasury notes, certificates of indebtedness and treasury bills owned by appellant. The amounts of such obligations of the United States so included in such tax returns for each of such years were as follows:

Year	Book Value of U. S. Obligations
1947	$105,468,000.00
1948	102,260,000.00
1949	99,238,000.00
1950	107,219,000.00
1951	97,930,785.40

[fol. 45] The tax returns filed by appellant, Society for Savings in the City of Cleveland, for the years here involved are true statements as to the books of account of the appellant for said years.

The amounts of the taxes assessed pursuant to the provisions of Section 5412, General Code, (excluding the taxes assessed on taxable deposits) for each of such years were

as follows. Such amounts were paid by the appellant on the dates indicated:

Year	Amount of Tax	Date of Payments
1947	$25,520.46	June 12, 1947
1948	25,595.58	June 28, 1948
1949	23,698.32	June 28, 1949
1950	24,843.04	June 29, 1950
1951	26,458.56	July 18, 1951
Total	$126,115.96	

Each party hereto reserves the right to object to the materiality or relevancy of any of the facts above stipulated, and each party reserves the right to offer additional evidence upon the trial of this case.

Thompson, Hine & Flory, by Jerome C. Fisher, Attorneys for Appellant. C. William O'Neill, Attorney General, Joseph S. Gill, First Assistant Attorney General, Attorneys for Appellee, Tax Commissioner of Ohio.

[fol. 46] BEFORE THE BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed August 21, 1952

Society for Savings in the City of Cleveland, appellant, hereby gives notice of its appeal to the Board of Tax Appeals from the findings of the Tax Commissioner, made on the thirtieth day of July, 1952. A true copy of the notice of said findings, sent by the Tax Commission to appellant, is attached hereto and incorporated herein by reference.

Appellant claims that said findings are erroneous in that they determine that there has not been any overpayment by the appellant of its intangible taxes for the years 1947 through 1951. The assessments of said taxes, as the findings of the Tax Commissioner correctly infer, included in the valuation of appellant's capital employed, obligations of

the United States owned by appellant. The value of such obligations of the United States, should have been excluded, in assessment of the tax, because the Constitution of the United States, as interpreted by the Supreme Court of the United States, and the provisions of Section 742, [fol. 47] Title 31, United States Code, require or provide that obligations of the United States shall be exempt from taxation by any state. Such exemption, if accorded to obligations of the United States owned by appellant, would have left none of appellant's capital subject to tax by the state of Ohio for the years in question. Consequently, the entire amount of taxes paid to the state of Ohio, for the years 1947 through 1951, namely $126,115.96, was overpaid, and appellant is entitled to a certificate of abatement for the same pursuant to Section 1464-3, Ohio General Code; and the findings of the Tax Commissioner were erroneous as a matter of law.

Thompson, Hine & Flory, Edgar P. Stocker, of Counsel, Attorneys for Appellant.

[fol. 48] BEFORE THE BOARD OF TAX APPEALS

TRANSCRIPT OF PROCEEDINGS

Examiner Ford: Before the Board of Tax Appeals, Department of Taxation, state of Ohio. Society for Savings of the City of Cleveland, appellant, against John W. Peck, Tax Commissioner of Ohio appellee, Case Number 22464. Appeal filed herein under date of August 26, 1952, from a final order of the Tax Commissioner under date of July 30, 1952, denying application for a certificate of abatement theretofore filed by the appellant on an alleged overpayment of taxes in the aggregate amount of $126,115.96, extended against surplus, undivided profits and general reserves of the appellant as reported by the appellant in its tax returns as a financial institution for the tax years 1947 to 1951 inclusive; which claim for overpayment of taxes of said amount is based upon the further claim that there were included in the resources and in resulting tax bases as returned by the company for said tax years, the government bonds and other government obligations which it is

claimed are not subject to taxation by the state of Ohio.

Case heard before William J. Ford, attorney examiner, Board of Tax Appeals, at the hearing room of the board, Columbus, Ohio, on November 12, 1952, pursuant to assignment.

Counsel for the appellant and the counsel for the appellee will at this time enter their appearances by name and by office address.

Mr. Fisher: Attorney for the appellant, Jerome C. Fisher, National City Building, Cleveland, Ohio.

Mr. Gill: Any other appearances, Mr. Fisher?

Mr. Fisher: Edgar P. Stocker, same address.

[fol. 49] Mr. Gill: Joseph S. Gill, Hugh A. Sherer, Mr. Everett Krueger, State House Annex, Columbus, attorneys for the Tax Commission.

Examiner Ford: Proceed, Mr. Fisher.

Mr. Fisher: I would assume, Your Honor, that you would like as brief as possible a statement of the issue presented in the case, and I shall make it very brief. The Society for Savings, the appellant here, is a mutual savings society originally incorporated by a special act of the legislature in 1849. In the year 1933 it was reincorporated as a mutual savings society pursuant to the recently passed Sections 710-148A to L of the General Code. It has no capital stock.

It has been stipulated, and in a moment the stipulation will be offered, that the tax returns filed by the Society for Savings and a part of the record before the Tax Commissioner are two statements of the books of account of the appellant for the years 1947 to 1951 which are here involved. It is also stipulated that in those years the Society for Savings held United States bonds and other obligations of the United States in the amounts shown in the stipulation, which being long and large figures, I won't here read; suffice to say they are substantially larger figures than the surplus undivided profits and reserves of the Society for Savings for those respective years.

Before I offer the stipulation, I might say, as it has already been stated by the court, the reason for the petition for abatement here is that the tax is assessed on the capital employed in the business including reserves, undivided

profits, and surplus; and as assessed by the Commissioner is a tax on United States obligations owned by the bank. Under what we believe to be long established constitutional principles governing the relationship between the states [fol. 50] and the United States government, due to the provision of the United States Constitution and a statute of the United States Congress and certain decisions of this board, and of the Ohio Supreme Court and of the United States Supreme Court, such a tax on government obligations may not be assessed and, therefore, we should have the abatement claimed. I now offer the stipulation.

Examiner Ford: Wait a minute. We have not got to that yet. Have you finished your statement?

Mr. Fisher: I have finished my statement.

Examiner Ford: Do you care to make a statement, Mr. Gill?

Mr. Gill: I have no quarrel, Mr. Ford, with the factual statements Mr. Fisher has made concerning the appellant, the Society for Savings, and most of the factual matter will be stipulated before the board. It can be said briefly on behalf of the Department of Taxation and the Tax Commissioner that it is our contention that this is truly a mutual savings society, that it has nothing in it but money belonging to depositors, that there is no capital as such, and that there has been no assessment made against the capital which, of course, we will brief after the case has been heard and submitted.

Examiner Ford: Now, of course, before the board, a claim was made that there had been no abatement of taxes in each and all of the years in question. I notice that the Tax Commissioner disposes of that contention in the last paragraph of the order of entry as follows: "Upon consideration of all the available evidence the Tax Commissioner finds that there has been no overpayment for the years in question and it is therefore ordered that this application in the same year is denied."

[fol. 51] The transcript which has been certified to the Board of Tax Appeals by the Tax Commissioner relating to this application for certificate of payment does not set forth any evidence which might have been referred to by the Tax Commissioner's order of entry. Do you know anything

about what payments were before the Tax Commissioner at that time?

Mr. Gill: So far as I know it was the copies of the tax return which are in your file, Mr. Ford, and his decision and his interpretation of the law applicable thereto. From my conversation with the Tax Commissioner, I know of no other evidence which was considered.

Examiner Ford: The point to my question was whether or not there was any evidence extraneous to those tax returns in the transcript. As far as you know there was no other thing?

Mr. Gill: So far as I know there was not, sir.

Examiner Ford: You may proceed with your evidence.

Mr. Fisher: I want to offer the stipulations signed by counsel for both parties. We offer the certified copy of the certificate of election and incorporation of the Society for Savings under Section 710-148. Then I have about two questions to ask after these have been recorded.

Examiner Ford: Now as to the agreed statement of facts, does counsel want that read and to become a part of the regular hearing, or do you want it to go in as an exhibit?

Mr. Gill: I have no feeling on the mat-er either way. Does the board have preference?

Examiner Ford. I think it does. I think it will be read into the record. I see it will be signed by counsel here and [fol. 52] you have reached an agreement that the statement may be read into the record at this time for the appellant.

* * * * * * *

Examiner Ford: You may proceed.

Mr. Fisher: I want to ask two or three questions of Mr. Johnson, the comptroller.

Rensselaer R. Johnson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fisher:

Q. Will you state your name and address?

A. Rensselaer R. Johnson. My address; you want my home address? 20845 Kinsman road, Shaker Heights, Ohio.

Q. Mr. Johnson, you are comptroller for the appellant here, the Society for Savings in the city of Cleveland?

A. Yes, sir.

Q. Is it within your knowledge from the books which were in your control as to about how many depositors there were in the Society for Savings at the beginning of the year 1947? If so, will you state the number?

A. Approximately 185,000 depositors at the beginning of 1947.

Q. Would you state the same figure for the beginning of 1948?

A. The beginning of 1948 it was 193,000 approximately.

Q. At the beginning of 1949?

A. It was 201,000

Q. And at the beginning of 1950?

A. It was 211,000.

Q. Beginning of 1951?

A. 226,000.

Q. Mr. Johnson, do you know and can you tell us whether there are any substantial changes in the personnel constituting those depositors? In other words, in these years do some depositors close their accounts and cease to be depositors, and do new persons become depositors?

A. Yes, we have new accounts opened every year and old [fol. 53] accounts are closed.

Examiner Ford: What was that answer?

The Witness: New accounts—several thousand new accounts are opened each year and several thousand closed each year.

By Mr. Fisher:

Q. Can you give us an approximation, an average rough of the number of closed accounts and of new accounts in each of these years?

A. They vary from year to year. The approximate figure—I would say we close probably 20,000 accounts a year and open a few more than that because there is an increase each year.

Mr. Fisher: That is all.

Mr. Gill: I have no question, Mr. Johnson.

Examiner Ford: What is your connection with the bank, Mr. Johnson?

The Witness: I am comptroller. Is that all there is?

Examiner Ford: That is all.

(Witness excused.)

Mr. Fisher: Your Honor, I think it should be understood with Mr. Gill that the record before the Tax Commissioner is part of the record in this case. There has been some question raised in the case.

Mr. Gill: Yes, do you want any introduction made of the record which is before the board, Mr. Ford?

Examiner Ford: Do you mean these transcripts that came up here?

Mr. Gill: That is right.

Examiner Ford: The law requires it and the Tax Commissioner presumably conforms to the law.

[fol. 54] Mr. Gill: I might say in all aspects, Mr. Ford, but we will get to that later.

Mr. Fisher: We rest our case.

Examiner Ford: As a part of the appellant's case, Appellant's Exhibit A offered in evidence and without objection the same is received.

(Appellant's Exhibit A was marked for identification and received in evidence.)

Mr. Gill: Mr. Ford, I have here a photostatic copy of a record. It has been agreed with Mr. Fisher, who will speak for himself in a moment, that counsel for the appellant stipulate and agree that this is a true copy of a record kept in the office of the auditor of state pursuant to law. This particular record refers to the year 1877 and pursuant to an act passed in 74 Ohio Laws, 26, and another act passed in 74 Ohio Laws, 72, later codified as Sections 3814 to 3821 of the Revised Statutes. It was required that this record be kept by the auditor of state. I am submitting it in this hearing pursuant to the provisions of Section 12102-26 of the General Code which is the Uniform Official Records as Evidence Act which provides that these matters shall be admissible when they have in fact been kept by state officials pursuant to authority vested in them by law. According to the provisions of that act, copies of this document have

been served on Mr. Fisher, counsel for the appellant, and at this time I am offering this record referring to the year 1877 as Appellee's Exhibit 1.

(Appellee's Exhibit 1 was marked for identification.)

Mr. Fisher: Your Honor, we have agreed with Mr. Gill that a photostat may be offered as if it were the original so there is no objection to the form of the exhibit. However, we do now object to its receipt in evidence on the [fol. 55] ground that it is neither material nor relevant to this case, being a report as to a year some seventy years earlier than any question involved in this case.

Examiner Ford: The board will not rule until after you have a chance to cross examine.

Mr. Gill: I should like to make this statement in reply to his objection, Your Honor, and the board may want to rule on this, Your Honor. It is our contention that there is no capital. It is truly a mutual savings bank, and in order to establish that fact throughout the history of the Society for Savings for the information of the board, I have gone back to the first report that I can find. This was the earliest year which they were required to make reports. I have certain other reports which I have taken at key periods to show the board that this has consistently been treated as depositors' money. This goes to the legal question involved in this case. Before we are through, I believe it will appear that this is material and relevant.

Will you please mark this as Appellee's Exhibit 2?

(Appellee's Exhibit 2 was marked for identification.)

Mr. Gill: I am offering now, Mr. Ford, under the same stipulation Appellee's Exhibit 2, having been submitted to Mr. Fisher for examination, the report of the Society for Savings for the year 1907.

Examiner Ford: 19 what?

Mr. Gill: 1907. I am offering it for this purpose: 1907 was the last year in which the auditor of state was required to keep these records. I am offering this simply to show the continuity of the reports and to establish that in that particular year the financial structure of the company was as it has been throughout its history.

I presume the same objection applies to that.

[fol. 56] Mr. Fisher: We made the same agreement as to the form so we do not object to the form of the exhibit, but object on the ground that it is immaterial and irrelevant.

Examiner Ford: Well, speaking with respect to Appellee's Exhibits 1 and 2, that is both of these exhibits, is there any question about the competency of the exhibit aside from the relevancy and materiality?

Mr. Fisher: No, Your Honor, we have stipulated as to their competency but we can't see that they have any bearing on the issue of this case.

Examiner Ford: In other words, your objection to the exhibits is with respect to their alleged want of materiality and relevancy.

Mr. Fisher: Exactly.

Mr. Gill: Will you mark this as Appellee's Exhibit 3, please?

(Appellee's Exhibit 3 was marked for identification.)

Mr. Gill: I am offering the Appellee's Exhibit 3, Mr. Ford, which is an excerpt from the annual report of the superintendent of banks made in the year 1908. It is offered for the same purpose as the Exhibit Number 2. This is the first report made by the superintendent of banks pursuant to the provisions of Section 710-18 of the Ohio General Code, which section is still in existence and shows that the continuity of the reports from the auditor's office to the superintendent of banks' office was picked up; and also for the purpose of showing that the financial structure of the appellant, Society for Savings, was the same as in other years.

Mr. Fisher: We admit the propriety of offering the copy. There is no objection to the form and use of a photostat. [fol. 57] We make the same objection that it is irrelevant and immaterial and, therefore, should be excluded.

Mr. Gill: Mark this Appellee's Exhibit 4, please.

(Appellee's Exhibit 4 was marked for identification.)

Mr. Gill: I am offering here the Appellee's Exhibit 4 which is an excerpt from the annual report of the division of banks for the year 1933. This financial report is particularly relevant for the issues here involved because you will recall, Mr. Ford, that 1933 was the year in which the

appellant, Society for Savings, was reorganized, which is now codified as Section 710-148A to L inclusive. It will be noted from this exhibit that in that year of the reorganization no change in the capital structure, which we contend is relevant to this matter, was made by the appellant, Society for Savings.

Mr. Fisher: Same objection.

Mr. Gill: Will you please mark this Appellee's Exhibit 5?

(Appellee's Exhibit 5 was marked or identification.)

Mr. Gill: I am offering here, Mr. Ford, the Appellee's Exhibit Number 5, an excerpt from the annual report of the division of banks for the year 1934. I offer it to show particularly that during the year 1934 the appellant, Society for Savings, presumably issued and showed on its reports three million dollars worth of capital notes or debentures.

Same objection for Mr. Fisher.

Mr. Fisher: We have agreed on the use of the copy but object to the materiality and relevancy.

Mr. Gill: Will you please mark this as Appellee's Exhibit 6?

(Appellee's Exhibit 6 was marked for identification.)

Mr. Gill: I am offering as the Appellee's Exhibit Number 6 an excerpt from the annual report of the division of banks [fol. 58] for the year 1942. I offer it particularly to show that on December 31, 1942, the appellant, Society for Savings, had outstanding eight hundred thousand dollars of capital notes or debentures.

Mr. Fisher: Same agreement as to form and same objection as to materiality and relevancy.

Mr. Gill: Will you mark this as Appellee's Exhibit Number 7, please?

(Appellee's Exhibit Number 7 was marked for identification.)

Mr. Gill: I am offering as the Appellee's Exhibit Number 7, Mr. Ford—

Examiner Ford: I take it so far as the question of competency is concerned you are offering these under the Uniform Evidence Act that was passed by the legislature.

Mr. Gill: Their admissibility comes squarely under Section 12102-26.

Examiner Ford: I understand that counsel is not objecting to these exhibits with respect to the admissibility as far as the uniform evidence rule is concerned, which was passed by the legislature, but your sole objection is on the grounds of relevancy and materiality.

Mr. Fisher: Yes, that is a correct statement of our position.

Mr. Gill: This is an excerpt from the annual report of the division of banks for the year 1943. It is introduced specifically to show that on December 31, 1943, the appellant, Society for Savings, had outstanding no capital notes or debentures and presumably had during that year paid off the last of its outstanding capital notes or debentures.

I have no other evidence, Mr. Ford. We rest our case.

[fol. 59] Examiner Ford: Well, before you rest, we better dispose of these exhibits. Although speaking personally and offhand, I am having some difficulty in seeing the relevancy of some of the exhibits, but I think that is a question to be passed on by the board and inasmuch as I am hearing this case only as an examiner, it is the order of the board through me as examiner at this time that objection of counsel to the admission of the exhibits be overruled so far as this hearing is concerned, but that the objection of counsel to each and all of these exhibits be reserved, and it is hereby reserved for the consideration of the board solely on the question as to whether or not they are relevant and material on a consideration of the issues in this case. For this purpose and for this end only the objection of counsel to the exhibits and each of them is overruled and exceptions of counsel for the appellant noted.

The exhibits are received in evidence subject to the reservation of the Board of Tax Appeals upon its consideration of the case on its merits.

(Appellee's Exhibits Number 1, 2, 3, 4, 5, 6, and 7 were received in evidence.)

Examiner Ford: Do you rest, Mr. Gill?

Mr. Gill: Yes, sir.

Examiner Ford: Appellant rests and appellee rests. There being no rebuttal evidence, case is submitted.

(Case submitted at 10:55 a. m.)

BEFORE THE BOARD OF TAX APPEALS

[fol. 60] ENTRY—Dated March 2, 1953

This cause and matter came on to be considered by the Board of Tax Appeals upon an appeal filed herein under date of August 21, 1952 by the appellant above named from a final order of the Tax Commissioner dated July 30, 1952 in and by which final order the Tax Commissioner denied appellant's application for a certificate of abatement for the alleged overpayment of intangible taxes for the years 1947 through 1951.

The cause was submitted on the notice of appeal, the Tax Commissioner's transcript for the years in question, an agreed statement of facts signed by counsel, the evidence presented to this board at a hearing upon the appeal, and briefs of counsel.

The notice of appeal, as filed with the Board of Tax Appeals, reads as follows:

* * * * * * *

The final order of the Tax Commissioner complained of reads as follows:

* * * * * * *

The agreed statement of facts filed with the Board of Tax Appeals under date of November 12, 1952, reads as follows:

* * * * * * *

The pertinent portion of General Code Section 1464-3 (2), by virtue of which the appellant filed its application for a certificate of abatement with the Tax Commissioner reads as follows:

> "* * *. On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to [fol. 61] the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to

make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. * * *."

The question presented to us for solution in this case can be stated as follows:

Was the Tax Commissioner in error—(1) in not finding that the appellant had overpaid its intangible taxes for the years 1947 through 1951, and (2) in not issuing certificates of abatement to appellant as prayed for in its application?

Or, the question may be stated in another way, to wit: Was the Tax Commissioner in error in including in the tax base the value of federal securities owned by appellant in assessing, pursuant to Section 5412, General Code, the value of "property representing the capital employed by" appellant (a financial institution), the capital of which financial institution is not divided into shares?

The federal constitutional provision and the federal statutory enactment relied on by appellant read as follows:

Constitution of the United States, Article I, Section 8, Clause 2.

> "The congress shall have power * * * To borrow money on the credit of the United States; * * *."

United States Code, Title 31, Section 742 (Revised Statutes, Section 3701)

> "Except as otherwise provided by law, all stocks, bonds, treasury notes, and other obligations of the [fol. 62] United States, shall be exempt from taxation by or under state or municipal or local authority."

The taxation sections of the Ohio General Code involving financial institutions read as follows:

Section 5406:

> "The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the General Code to

the extent that such deposits are made taxable by section 5328-1 of the General Code, excepting deposits belonging to the federal government or any instrumentality thereof; or deposits to the extent of advances or advance payments made under any contract entered into by the federal government or any instrumentality thereof for the production of materials or supplies or the furnishing of services pursuant to authority of any act to further the war effort; or deposits belonging to the state of Ohio or any county, municipal corporation, school district, township, or other subdivision thereof, or to any other financial institution, or to a dealer in intangibles or a domestic insurance company, or to an institution used exclusively for charitable purposes, or proceeds of loans which have been credited to the borrower but not disbursed, or advances by borrowers for the subsequent payment of specific obligations. If any deposit belonging to any of the classes required so to be returned consists in whole or in part of an amount representing uncollected checks and other uncollected items, credited thereto, one-half of the amount so represented shall be considered as withdrawable and to be so included in ar- [fol. 63] riving at the aggregate balance of taxable deposits, required so to be returned, whether or not the depositor is in fact permitted to make withdrawals against the amount so represented and credited."

Section 5407:

"The term 'financial institution' as used in this chapter includes every person who keeps an office or other place of business, in this state and engages in the business of receiving deposits, and of lending money, buying or selling bullions, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit. Provided that corporations or institutions organized under the provision of the act of congress, known as the federal farm loan act, approved July 17, 1916, and amendments thereto, and insurance companies, shall not be considered financial institu-

tions or dealers in intangibles within the meaning of this chapter."

Section 5408:

"All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution, located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the [fol. 64] capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this chapter."

Section 5409:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

Section 5410:

"There shall be kept in the offices at all times where the business of such financial institution is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which, at all times during business hours, shall be open to the inspection of all officers who are or may be authorized to list or assess such shares for taxation, or to administer the laws relating to such assessment."

Section 5411:

"The cashier or other principal accounting officer of each incorporated bank, the secretary or other principal accounting officer of each other incorporated financial institution, the cashier, manager or owner of each unincorporated bank, and the manager, owner or owners of each other unincorporated financial institution, shall return to the department of taxation be- [fol. 65] tween the first and second Mondays of March, annually, a report exhibiting in detail, and under appropriate heads, the resources and liabilities of such institution at the close of business on the thirty-first day of December next preceding."

Section 5411-1:

"On or before the fifth day of December annually, the tax commission of Ohio shall fix the day as of which the taxable deposits in financial institutions shall be listed and assessed. The day so fixed shall be between the first and the thirtieth days of November both inclusive and the action of the commission shall be taken not more than five days after the day so fixed. Notice of such action shall be immediately given to each financial institution and to the auditor of each county by registered mail, and the date so fixed shall be printed or stamped on the forms of return to be made by all financial institutions. The dates herein fixed for the action of the commission are directory merely, and if through inadvertence or mistake such action is not taken at the time herein prescribed, or the notice herein required to be given to a financial institution or a county auditor is not duly given, the remaining requirements of this chapter and the validity of any assessment made hereunder shall not be affected thereby."

Section 5411-2:

"The report of each financial institution made pursuant to section 5411 of the General Code shall also show the aggregate balances of the taxable deposits

[fol. 66] of its depositors, in each county in which the institution maintained an office or offices for the receipt of deposits, at the end of business on the day fixed by the board of tax appeals pursuant to section 5411-1 of the General Code. The report shall show also the names and addresses of all depositors whose deposits were wholly withdrawn from such institution between the day so fixed and the date on which notice of the fixing thereof was received by such institution, or if no such notice was received then between the day so fixed and the first day of January next following, and the amount of the taxable deposits of each such depositor on the day so fixed."

Section 5412:

"Upon receiving such report the tax commissioner shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial institution excepting that the amounts of taxable deposits wholly withdrawn from each such institution within the times mentioned in section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective de- [fol. 67] positors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5412-1:

"On or before the first Monday of May, annually, the tax commissioner shall certify to the auditor of state the assessment of each financial institution located in the state, showing separately the county in which the institution's principal office is located, and the amount or amounts of taxable deposits, if any, of branches in each county other than that in which such principal office is located, and to each county auditor the assessment of each taxable deposit separately assessed in the name of a depositor residing in his county. The auditor of state shall place the amount or amounts so certified on the intangible property tax list in his office. The county auditor shall place the amounts so certified on the classified tax list and duplicate of his county in the names of the depositors represented by such certificates.

"Any certificate of abatement issued pursuant to section 5464-3 of the General Code for the overpayment of the deposits tax or taxes imposed on shares of financial institutions or on capital employed by financial institution may be tendered by the payee or transferee thereof to the treasurer of state as payment for any taxes allocable to the county in which the claim for overpayment arose."

[fol. 68] Section 5638-1:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; * * *."

Section 5672:

"Taxes assessed on non-withdrawable shares of stock, of a financial institution, shall be a lien on such shares from the first day of January in each year until they are paid.

It shall be the duty of every financial institution to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer to state and any financial institution failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

Section 5673:

"Such financial institution paying to the treasurer of state the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of [fol. 69] stock and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be enforced in any appropriate manner."

Section 5673-1:

"Taxes assessed on deposits in a financial institution in this state shall be a lien on the deposit of each person as of the day fixed by the tax commission of Ohio for the listing of such deposits. Taxes assessed on the shares of stock of such an institution, all of whose shares are withdrawable and defined as deposits in chapter four of this title, shall be a lien on such shares so defined as deposits as of the day so fixed. It shall be the duty of every financial institution to pay the taxes on the amount of such deposits and/or withdrawable shares assessed in its name to the treasurer of state and any such institution failing to pay such taxes as herein provided shall be liable by way of penalty for the gross amount of the taxes due on and with respect to all its deposits and withdrawable shares assessed in its name and for an additional amount of one hun-

dred dollars for every day of delay in the payment of such taxes."

Section 5673-2:

"A financial institution so required to pay to the treasurer of state the taxes assessed upon its deposit accounts, as taxable property of its depositors, and or upon its withdrawable shares as taxable property of [fol. 70] its shareholders respectively, as provided in the next preceding section, may, upon receipt of notice of the day fixed for the listing of such deposits, charge the amount thereof to and deduct the same from the deposit of each depositor, or from the interest that is due or thereafter becomes due thereon, or from the dividends that are due or thereafter become due thereon, as the case may be, and shall have a lien upon such deposit, interest and/or dividends and on all funds in its possession belonging to such depositor or shareholder, or which may at any time come into its possession, for reimbursement of the taxes so payable, with legal interest. Such lien may be enforced in any appropriate manner at any time within six months after the payment of the taxes to the treasurer."

Appellant maintains that in assessing, under Section 5612 of the General Code, the "value of the property representing the capital employed" by an incorporated savings society, which has no capital stock, the state of Ohio must exclude from the assets of the institution the value of the United States obligations owned by it.

Appellant further says that Section 5612 General Code provides that the assessment of "property representing the capital employed" shall be measured by "the aggregate amount of the capital, the surplus or reserve fund and the undivided profits, as shown in the institution's annual tax report; and that the inclusion of the value of federal securities owned by such a financial institution in its tax base for assessing the capital employed by such institution in legal effect imposes a tax upon the securities in violation of Clause 2, Section 8, Article I of the United States Constitution and Federal Statute, Title 31, Section 742.

[fol. 71] Appellant further says that it is apparent upon the face of the tax returns filed by appellant for the years 1947 through 1951 that the value of United States obligations owned by appellant in each year exceeded by many millions of dollars the total of its surplus or reserve funds and undivided profits and that the exclusion of the value of the United States obligations from the asset values used in computing surplus or reserves and undivided profits would have left no surplus or reserves or undivided profits subject to tax.

Appellant also says that since it is a financial institution having no shares, it necessarily follows that it has no shareholders from whom it could seek reimbursement for any tax assessed on "the value of the property representing the capital employed", and thus the tax is assessed expressly and directly upon the appellant itself.

The Tax Commissioner says that appellant has voluntarily paid the taxes assessed against it on account of its surplus, reserves and undivided profits and that it can properly pass said taxes on to its depositors inasmuch as there is such an identity between the mutual fund and its depositors that when any such tax is paid the burden thereof is automatically passed on to the depositors.

With this contention of the Tax Commissioner we cannot agree—but even so the question as to whether the appellant may pass the tax on to its depositors is not in issue in this case—and in any event there is no statute which purports to give the appellant the right to pass this tax on to its depositors.

What we are interested in is the answer to this question:

What is the nature and kind of property which has been assessed for taxation by the Tax Commissioner?

[fol. 72] It appears to us to be clear that federal securities are the kind of property that has been assessed for taxation by the Tax Commissioner—for if federal securities are excluded from the Tax Commissioner's base the computation shows no tax due; and it likewise appears clear that the taxes have been assessed against the appellant corporation itself and not against any shareholders or depositors.

The distinction between taxing the shareholders upon their shares, and taxing the appellant upon its "capital or

property representing the capital employed" has been clearly drawn by our Supreme Court in the case of the Cleveland Trust Company v. Lander, 62 Ohio State Reports at page 266, affirmed in 184 U. S. 111. That case involved the tax upon the share as property of the shareholders, which was found constitutional, and the court said at page 274:

> "Here lies the distinction. The tax is upon the shares and not upon the capital. If the tax was on the capital, the federal bonds would have to be deducted, but being upon the shares no such deduction is required, allowed or authorized."

However, the decisions of the Supreme Court of the United States leaves no room for doubt but that a state tax upon the "capital employed, or the property representing it" (General Code, Section 5408), of a corporation is unconstitutional and violative of the requirement of the federal statute if and to the extent that the value of federal securities is included in the tax base. The cases sustaining the foregoing conclusion of law extend over a long period of years. People v. Commissioners of Taxes, 2 Black 620 (1863); Bank Tax Case, 2 Wall. 200 (1864); Home Savings Bank v. Des Moines, 205 U. S. 503 (1906); Farmers and Mechanics [fol. 73] Savings Bank v. Minnesota, 232 U. S. 516 (1914); Missouri v. Gehner, 281 U. S. 313 (1930); New Jersey Realty Title Insurance Company v. Division of Tax Appeals, 338 U. S. 665 (1950).

In a case where the issue was somewhat similar to that now before us this board, in Stephenson and Potter v. Glander, 67 N. E. 2d 14, 35 Ohio Opinions 368, 46 Ohio Law Abstract 203 (1946) said at page 370 of 35 Ohio Opinions:

> "In the consideration of the question thus presented it is recognized that the tax on dealers in intangibles provided for by Section 5414-1 et seq., General Code, is a property tax as distinguished from a franchise tax or other form of excise taxes; and that in his case where the tax is on the appellant as an unincorporated dealer in intangibles, the tax is on the employed capital of the appellant itself—unlike the case where the dealer in intangibles is a corporation and the ultimate inci-

dence of the tax is on the shares of stock as property of the shareholders. In this situation and recognizing that the greater bulk of the nontaxable securities here in question consists of United States government bonds, we are required to give application to the principle that the state has no power to assess against a corporation or other like entity a tax which is essentially a property tax, as distinguished from a franchise privilege or excise tax without allowing a deduction for sums invested in securities in the United States; and this is true whether the tax purports to be one laid directly upon the property or upon the capital of such entity. Home Insurance Company of New York v. New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. Ed. 1025; Home Savings Bank v. Des Moines, 205 U. S. 503, 509, 521, 27 S. Ct. 571, 51 L. Ed. 901."

And again at page 373:

"Although there is, admittedly, some doubt as to the authority of the Board of Tax Appeals as a quasi ju- [fols. 74-158] dicial tribunal to pass on the constitutionality of statutes and to strike down statutes determined by it to be unconstitutional, this board, like courts and other tribunals possessing judicial or quasi judicial authority, is required to construe statutes so as to preserve, if possible, the provisions thereof as enacted."

With these thoughts in mind and upon the consideration of all the evidence before us we therefore find that the final order of the Tax Commissioner complained of was in error and said final order is hereby reversed.

We find that appellant, by virtue of the failure of the Tax Commissioner (in his computation of the "value of the property representing the capital employed") to exclude from its tax base the federal securities owned by appellant, has overpaid its intangible taxes for the years of 1947 through 1951 in the amounts stated in its application for a certificate of abatement; and this case is hereby remanded to the Tax Commissioner with instructions to issue to appellant the certificate of abatement as requested.

I hereby certify the foregoing to be a true and correct

copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

Francis P. Howard, Secretary.

[fol. 159] IN THE SUPREME COURT OF OHIO

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellee

v.

PECK, TAX COMMR., Appellant

Taxation—State property tax—Tax on federal securities not permitted—Capital or net worth of corporation—Federal securities excluded in computing—Ownership interests of owners of corporations taxable—Incorporated financial institution without capital stock—Capital derived from depositors—Depositors owners of ownership interests—Property tax levied on ownership interests—Amount of tax—Bank may be required to pay, when—Tax on "capital employed"—Section 5408, General Code—A tax on ownership interests of owners—"Value of prop-
[fol. 160] erty representing capital employed" defined—Section 5412, General Code—"Shares in and capital employed by" construed—Section 5638-1, General Code—Value of intangible interests of ownership of owners—Deduction on account of federal securities owned by corporation, not required.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a property tax against a corporation on its capital or on its net worth without excluding federal securities from the assets of the corporation in the computation of such capital or net worth.

3. A state may levy a property tax on the ownership interests of the owners of a corporation, even though all the assets of the corporation are federal securities and even though the net worth of the corporation is used as the measure of the value for such taxation of such ownership interests.

4. A property tax may be levied on the ownership interests in a corporation even though the corporation is required to pay the tax on behalf of those who own such interests.

5. Where an incorporated bank has no capital divided into shares and no capital stock and all its capital is derived from its depositors, the depositors of such bank not only have interests in such bank as creditors of the bank for the amounts of their deposits but also are ordinarily the owners of all the ownership interests in such incorporated bank.

6. A property tax may be levied on the ownership and other interests of the owners of a corporation in such corporation at amounts equal to their book values, although, as long as the corporation continues to operate as a going concern, such interests may be withdrawn only at fixed amounts less than their book values and identical interests may be acquired from the corporation by others at such fixed amounts less than their book values.

7. Where all the ownership interests of the owners of a bank are vested in depositors of a single class, such bank may be required by statute to pay a property tax levied on such ownership interests if and when such bank has available for payment of interest to its depositors more than enough to pay the tax so levied.

8. With respect to an incorporated financial institution, the tax provided for by Section 5408, General Code, on "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock," is a tax on the owner-[fol. 161] ship interests of the owners of such corporation and not a tax on any property or capital of the corporation.

9. As to an incorporated financial institution, the words, "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in the first sentence of Section 5412, General Code, describe the value of the intangible interests of ownership of the owners of such a corporation and do not refer to the value of any of the capital or property of or belonging to such corporation.

10. As to incorporated financial institutions, the words "shares in and capital employed by financial institutions" as found in Section 5638-1, General Code, describe the inter-

ests of ownership of the owners of such corporations and not any property of or belonging to such corporations.

11. In ascertaining and assessing pursuant to Section 5412, General Code, the value of the intangible interests of ownership of the owners of an incorporated financial institution having no capital divided into shares at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits of the corporation as shown in the report required of the corporation, the Tax Commissioner is not required to make any deduction from such amount on account of federal securities owned by the corporation.

(No. 33523—Decided March 10, 1954)

Appeal from the Board of Tax Appeals.

The Society for Savings in the City of Cleveland filed with the Tax Commissioner an application pursuant to subdivision 2 of Section 1464-3, General Code, for a certificate of abatement for alleged overpayment of taxes assessed for the years 1947 to 1951, inclusive, pursuant to Sections 5408 and 5412, General Code, on "the capital employed, or the property representing it, in" said Society for Savings, and levied pursuant to Section 5638-1, General Code. The Society for Savings is an incorporated financial institution having depositors but its capital is not divided into shares and it has no capital stock. It is organized under Sections 710-145 to 710-149, inclusive, General Code.

Section 5408, General Code, provides:

[fol. 162] "All the shares of the stockholders in a financial institution, located in this state, incorporated or organized under the laws of the state or of the United States, the capital stock of which is divided into shares, excepting such as are defined as 'deposits' in Section 5324 of the General Code, and all the shares of the stockholders in an unincorporated financial institution located in this state, the capital stock of which is divided into shares held by the owners of such financial institution, and the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock, located in this state, shall be listed and assessed at the book value thereof, and taxed in the manner provided in this Chapter."

Section 5409, General Code, provides:

"The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this Chapter shall be in lieu of all other taxes on the other property and assets of such institution."

By Section 5411, General Code, a report is required "exhibiting in detail * * * the resources and liabilities of" a financial institution at the close of each year.

Section 5412, General Code, provides:

"Upon receiving such report the Tax Commissioner of Ohio shall ascertain and assess all the taxable shares of such financial institution, or the value of the property representing the capital employed by such financial institution, not divided into shares, at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits as shown in such report, and the amount of taxable deposits of such institution in each county in which the institution maintained an office or offices for the receipt of deposits. Such amounts shall be assessed in the name of such financial insti- [fol. 163] tution excepting that the amounts of the taxable deposits wholly withdrawn from each such institution within the times mentioned in Section 5411-2 of the General Code and separately set forth in such report shall be subtracted from the amount of taxable deposits so assessed and separately assessed in the names of such respective depositors. In the case of an incorporated financial institution all of whose shares constitute deposits as defined in Section 5324 of the General Code such assessment of shares shall exclude the capital stock thereof as so shown but shall include the surplus or reserve and undivided profits so shown."

Section 5638-1, General Code, provides in part:

"Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the Auditor of State and duplicate thereof in the office of Treasurer of State at the following rates, to wit:

"* * * deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar * * *."

In computing, pursuant to Section 5412, General Code, "the aggregate amount of the capital, the surplus or reserve

fund and the undivided profits as shown in" the reports made by the Society for Savings for the years 1947 to 1951, inclusive, there was included in the assets of the Society for Savings the amount of federal securities owned by it. It was contended on behalf of the Society for Savings that such federal securities should have been excluded from its assets in making that computation.

The application was denied by the Tax Commissioner. On appeal to the Board of Tax Appeals the order of the Tax Commissioner was reversed and he was directed to issue the certificate of abatement as requested.

The Tax Commissioner has appealed to this court from that decision of the Board of Tax Appeals.

[fol. 164] *Messrs. Thompson, Hine & Flory, Mr. Jerome C. Fisher* and *Mr. Edgar P. Stocker*, for appellee.

Mr. C. William O'Neill, attorney general, and *Mr. Joseph S. Gill*, for appellant.

TAFT, J. The question to be decided is whether, in ascertaining and assessing "the value of the property representing the capital employed by [an incorporated] financial institution, not divided into shares," pursuant to Section 5412, General Code, the Tax Commissioner must eliminate federal securities owned by such institution in computing "the aggregate amount of the capital, the surplus or reserve funds and the undivided profits" of such institution.

It should be observed that the word "capital" when used with reference to a corporation, may be used to describe at least three different things. For example, it may be used (1) to describe all the property or assets of the corporation (see *National Bank* v. *Commonwealth*, 76 U. S. [9 Wall.], 353, 19 L. Ed., 701, 702), (2) to describe a bookkeeping figure representing a part or all of the net worth of the corporation (*Missouri, ex rel, Missouri Ins. Co.* v. *Gehner, Assessor*, 281 U. S., 313, 74 L. Ed., 870, 50 S. Ct., 326), and (3) to describe part or all of the property interest in the corporation which belongs to its shareholders or other owners.

The difference between the first and third of the above-mentioned uses of that word is well demonstrated in the opinion by Mr. Justice Miller in *National Bank* v. *Commonwealth, supra*, where it is said:

"* * * it has been established as the law governing this court that the *property or interest of a stockholder in an*

incorporated bank, commonly called a share, the *shares in their aggregate totality being called sometimes the capital stock* of the bank, *is a different* thing *from* the monied *capital of the bank* held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, [fol. 165] or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the states, or in bonds and mortgages. In whatever it may be invested it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government it could not be taxed, nor could the corporation be taxed as the owner of such securities.

"On the other hand, we have held that the shareholders, or stockholders, by which is meant the same thing, may be taxed by the states on stock or shares so held by them, although all the capital of the bank be invested in federal securities * * *." (Emphasis added.)

Considerable care must therefore be used in determining what the word "capital" means in each instance in which it is used in the statutes here involved.

Before analyzing the statutes involved it will also be helpful to state several basic propositions of law which seem to be well settled.

1. A state cannot levy a property tax on federal securities.

2. A state cannot levy a property tax against a corporation *on its* capital or *on its* net worth without excluding federal securities in the computation of *such* capital or net worth. In the absence of such an exclusion, such a tax is regarded in effect as being a tax on the federal securities. *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner, Assessor, supra; Farmers and Mechanics Savings Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 58 L. Ed., 706, 34 S. Ct., 354; and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 94 L. Ed., 439, 70 S. Ct., 413.

3. On the other hand, a state may levy a property tax on the ownership interests of the shareholders of a corporation, even though all the assets of the corporation are [fol. 166] federal securities and even though the net worth of the corporation is used as the measure of the value for

such taxation of the ownership interests in the corporation. See for example *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111, 46 L. Ed. 456, 22 S. Ct. 394, affirming 62 Ohio St. 266, 56 N. E. 1036; *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069, 17 S. Ct. 629; *National Bank* v. *Commonwealth, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor*, 263 U. S. 103, 68 L. Ed. 191, 44 S. Ct. 23.

As stated in the leading case of *Van Allen* v. *Assessors*, 70 U. S. (3 Wall.), 573, 583, 18 L. Ed. 229:

"* * * the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *Queen* v. *Arnoud* [9 Adolph & E. N. S. 806]. The question related to the registry of a ship owned by a corporation. Lord Denman oberved: 'It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.'

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may [fol. 167] remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed * * *."

Furthermore, merely because a statute requires a corporation primarily to pay a property tax on the ownership inter-

ests of its shareholders, such tax is not necessarily a tax on the property of the corporation. See for example *Cleveland Trust Co.* v. *Lander, supra; Aberdeen Bank* v. *Chehalis County, supra;* and *Des Moines National Bank* v. *Fairweather, Mayor, supra.*

As stated in the opinion in the leading case of *National Bank* v. *Commonwealth, supra:*

"But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. We are, therefore, of the opinion that the law of Kentucky is a tax upon the shares of the stockholder."

As to the Society for Savings, the answer to the ques-[fol. 168] tion, whether the tax provided for by Section 5408, General Code, may be levied without excluding federal securities from the computation provided for in Section 5412, General Code, depends on whether the tax is or is not on the property *of* the corporation which is the owner of those federal securities, or on part or all *of its* net worth. This in turn depends upon the meaning of the words in Section 5408, General Code, "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock." Admittedly, the capital of the Society for Savings is not divided into shares and it has no capital stock.

In considering these statutory words, the question immediately arises as to whose "capital" or whose "property" is to be taxed. Is it the capital or property of the financial

institution or is it the capital or property of the owners of the financial institution?

On a hasty reading of these words, it might appear reasonably arguable that, standing alone, these words could be given either meaning.

However, if these statutory words are examined with reasonable care, it is difficult to comprehend how "capital employed, or the property representing it, in a financial institution" could properly be used to describe capital or property of and belonging to such institution. It is apparent from a reading of Section 5412, General Code, that these words could not have been intended to describe all the assets of the bank. That section provides for assessing "the value of the property representing the capital employed by such financial institution * * * at the aggregate amount of the capital, the surplus or reserve fund and the undivided profits." So far as the corporation is concerned, such an amount is a mere bookkeeping figure and is not represented by any property of the institution. See *Southern Gum Co.* v. *Laylin*, 66 Ohio St., 578, 596, 64 N. E., 564. [fol. 169] The property of the institution is an important factor in determining what it is but there is another equally important factor in its determination, that is, the debt obligations of the institution including its deposit obligations. On the other hand, the interests of the owners of the corporation are as to them a species of intangible property and are sometimes described as their capital investment in the corporation or the capital which the owners have "*in*" the corporation. As so used, such "capital employed * * * in" the corporation is always regarded as a species of intangible property belonging to such owners. As to them, their intangible property interest in the corporation may well be said to be "property representing" their "capital employed * * * in" the corporation.

Furthermore, the General Assembly clearly disclosed that it knew how to use the word "capital" to describe the capital of the corporation. Thus, after referring to "the capital employed * * * *in* a financial institution," it used the words "*the capital of* which is not divided into shares, or *which has no capital stock.*" If it had intended the words "the capital *employed* * * * *in* a financial institution" to

mean "the capital *of*" such institution, it could easily have said "the capital of a financial institution [which is] not divided into shares" instead of "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares," thus eliminating the use of at least nine words and clearly expressing that intent. The General Assembly did not do that. By using the words "capital employed * * * in" instead of "capital of" a financial institution at the same time that it showed that it knew how to use the words "capital of" such an institution, the General Assembly clearly indicated an intention to distinguish between the capital of or belonging to such institution and the capital of and belonging to the owners and employed *in* the institution.

[fol. 170] In addition, when the whole of Section 5408, General Code, is read, it is apparent that it is the capital or property of the owners of the institution and not that of the institution which the General Assembly intended to describe by the use of the words "the capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

Section 5408, General Code, deals with three distinct objects of taxation:

(1) "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

As to the first two objects of taxation, it is clear that the property intended to be taxed is that of the owners of the financial institution, that is, its shareholders, and not the property of the financial institution. It would not be reasonable to impute to the General Assembly an intent, with respect to the third object of taxation there dealt

with, to provide for taxing the property of the financial institution, instead of the property of the owners of the financial institution, unless the language used clearly required the imputation to the General Assembly of such an inconsistent intent.

With respect to statutory provisions somewhat similar to Section 5409, General Code, it is said in the opinion in *Des Moines National Bank* v. *Fairweather, Mayor, supra,* at pages 110 and 111:

"As construed by the Supreme Court of the state, the statute as a whole contemplates * * * that the shares be [fol. 171] assessed to the stockholders as their property; and as illustrating that the statute makes a clear distinction between the shares and the property of the bank, the court points to the provision which requires that the real estate be assessed against the bank and to the succeeding provision which declares that 'the property of such corporation shall not be otherwise assessed.' This, without more, seems completely to refute the contention that what the statute really directs is an assessment of the bank's property instead of the stockholders' shares."

Likewise Section 5412, General Code, makes it apparent that the General Assembly intended to tax the property of the owners of financial institutions with respect to all three of the above-mentioned objects of taxation dealt with in Section 5408, General Code. Thus the first sentence of that section provides for a uniform manner of ascertaining and assessing the amount at which the property is to be taxed with respect to all three of those objects of taxation.

Also, that sentence obviously regards "shares of stockholders in a financial institution [as appears from Section 5408, General Code, these are the 'shares' meant]" which has shares as having a taxable equivalent in a financial institution which has no shares. It describes that taxable equivalent as "the value of the property representing the capital *employed by* [not 'of'] such financial institution, not divided into shares." "Shares of stockholders in a financial institution" obviously are evidence of and represent "capital employed by" a financial institution where it has shares. See Section 5408, General Code.

The legislative intent, that the words "capital employed in" or "by" a financial institution not having shares should describe the intangible property interest of the owners of such an institution just as the words "shares in" do, is [fol. 172] further demonstrated by the words of Section 5638-1, General Code, levying the tax on "the kinds and classes of intangible property * * * enumerated" including "shares in and capital employed by financial institutions."

Such conclusion is further fortified by the last sentence of Section 5412, General Code, which deals with financial institutions having only withdrawable shares. By the provisions of Section 5324, General Code, such shares are defined as "deposits"; and, in describing the first of the three above-mentioned objects of taxation dealt with in Section 5408, General Code, the shares of such institutions are expressly excepted from the shares of the classification of financial institutions there involved. Under Section 5406, General Code, those withdrawable shares must be returned as deposits. Under the first sentence of Section 5412, General Code, their amounts are assessed for taxation as deposits but not as "shares." However, the last sentence of Section 5412, General Code, provides for their assessment also as shares and states with respect to them that "such assessment of shares shall exclude the capital stock thereof * * * [already assessed as deposits] but shall include the surplus or reserve and undivided profits * * *." *First Federal Savings & Loan Assn. of Warren* v. *Evatt, Tax Commr.*, 143 Ohio St., 243, 54 N. E. (2d), 795.

Our conclusion is that the words, "capital employed, or the property representing it, in a financial institution the capital of which is not divided into shares or which has no capital stock" as found in Section 5408, General Code, the words "the value of the property representing the capital employed by such financial institution, not divided into shares" as found in Section 5612, General Code, and the words "capital employed by financial institutions" as found in Section 5638-1, General Code, were intended by the Gen- [fol. 173] eral Assembly in each of those sections to describe the intangible property interests of ownership in a financial institution and not to describe the capital or any of the

property of or belonging to such an institution. It follows that, where a financial institution without capital divided into shares or without capital stock is a corporation, the General Assembly indicated an intent to impose a tax upon the intangible property interests of ownership of the owners of the corporation, and not a tax upon the capital of or any property of or belonging to the corporation. The Society for Savings is such an incorporated financial institution.

However, it is argued that such a legislative intention cannot be given effect because there is no statutory provision which would enable the Society for Savings to secure reimbursement from those whose property would be taxed for the tax thereon that the Society for Savings would be required to pay.

In Sections 5672 and 5673, General Code, provisions are made to insure reimbursement from its shareholders by a financial institution on account of taxes paid by it which were assessed on its nonwithdrawable shares. Likewise provisions to insure reimbursement on account of payment by a financial institution of taxes assessed upon its deposits as taxable property of its depositors and its withdrawable shares as taxable property of its shareholders are made in Sections 5673-1 and 5673-2, General Code. However, it is arguable that, unless these latter two sections are given a broader construction than their words appear to justify, there is no specific statutory provision which would enable an incorporated financial institution, the capital stock of which is not divided into shares or which has no capital stock, to secure reimbursement from those who are or may be owners of the intangible property representing the capital employed by such owners *in* the corporation. In our [fol. 174] opinion, such a provision is not necessary to enable such a financial institution to secure such reimbursement. *Citizens National Bank* v. *Commonwealth of Kentucky*, 217 U. S., 443, 54 L. Ed., 832, 30 S. Ct., 532; *Aberdeen Bank* v. *Chehalis County, supra; and National Bank* v. *Commonwealth, supra.*

With respect to that species of intangible property which represents the ownership interests in a corporation, the capital of which is not divided into shares or which has no

capital stock, payment by the financial institution of the tax will always in effect amount to payment by those who are the beneficial owners of such intangible property. Such payment will necessarily reduce the amount, which the corporation will have available for payment of interest to depositors or holders of withdrawable shares and which will be available for protection of their deposits or stock claims and for distribution to them in the event of liquidation of the corporation. Thus, the financial institution, which pays the tax on their property interests in the corporation, will always be able to reimburse itself by reducing the ultimate value of the property interests of those who are the only ones who can have any claim to benefit from the ownership interests taxed.

Payment by the corporation of the tax on their intangible ownership interests in the corporation will necessarily reduce, to the extent of the payment made, those funds available for payment of interest on their deposits, and will likewise reduce the amount available only to them in the event of liquidation of the corporation. In the instant case, it appears that there was available for payment of interest on deposits more than enough to pay the taxes assessed against the owners of the "capital employed in" and "by" the Society for Savings as measured by the provisions of Section 5612, General Code, for assessment of that "cap-[fol. 175] ital." That capital, as well as their deposit claims, was owned by the depositors.

The decision actually rendered by this court in *Collett, Treas.*, v. *Springfield Savings Society*, 56 Ohio St., 776, 49 N. E., 1109 (affirming without opinion 13 C. C., 131, 7 C. D., 146), is not inconsistent with such a conclusion.

In the opinion of *Bank Commissioners* v. *Watertown Savings Bank*, 81 Conn., 261, 70 A., 1038, it is said:

"It is true that the profits or income of savings-banks are not all payable at the same time or in the same way, and that they may be held by the bank as a fund until they have reached a specified amount. This is for the sole purpose of protecting depositors against unforeseen contingencies. There is nothing in these statutes which militates against the general proposition that the income or

profits of savings-banks belong to the depositors and are a part of the deposits. In the end, it is the general spirit and purpose of the charters of savings-banks and of the laws of this state, that depositors, or their representatives, are entitled to all the pecuniary benefits arising from the deposits, less the reasonable expenses that may be chargeable thereon."

In *Barrett* v. *Bloomfield Savings Institution*, 64 N. J. E. 425, 54 A., 543 ("affirmed, for the reasons stated," 66 N. J. Eq. 431, 57 A., 1131), it is said on page 434 in the opinion in quoting with approval from the opinion in *Hannon* v. *Williams*, 7 Stew Eq., 255:

"'In a savings bank the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity they are the stockholders among whom the profits are divided. In case of insolvency they are the creditors, and usually the only [fol. 176] creditors, among whom the remaining assets are to be distributed.'"

In *Huntington* v. *Savings Bank*, 96 U. S., 388, 24 L. Ed. 777, it is said in the opinion by Mr. Justice Strong:

"* * * the primary idea of a savings bank has been, that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors, in dividends, or in a reserved surplus for their greater security."

In *Lewis, Admr.*, v. *Lynn Institution for Savings*, 148 Mass., 235, 19 N. E., 365, 12 Am. St. Rep., 535, 1 L. R. A., 785, it is said on page 243 in the opinion by Allen, J.:

"* * * the fundamental idea has never been departed from, that all the funds and investments of a savings bank are held exclusively for the benefit and security of the depositors. This idea was, and still is, the corner stone of the whole system. There is no corporation, with any purpose or possibility of profit to itself, independently of the depos-

itors; but the latter are to share whatever profit may be made in just proportion among themselves. * * *"

In *Cogswell* v. *Rockingham Ten Cents Savings Bank*, 59 N. H. 43, it is said in the opinion by Clark, J.:

"The assets of savings-banks consist of loans of money made by them for the benefit of their depositors, from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings-banks stand in the same relation to the assets of the bank as stockholders to banks of discount."

See also *Worcester County Inst. for Savings* v. *City of Worcester*, 10 Cushing (Mass.), 128, and *Providence Inst. for Savings* v. *Gardner*, 4 R. I., 484, indicating that the depositors of an incorporated financial institution having no capital stock, in addition to being creditors of the corpora- [fol. 177] tion, have ownership interests in such corporation corresponding to the ownership interests of the shareholders in an incorporated financial institution having shares of capital stock.

Thus, the ownership interests of the depositors in the corporation and not any capital or property of or belonging to the corporation are the property which is to be taxed pursuant to Section 5408, General Code, assessed pursuant to Section 5412, General Code, and upon which the two-mill tax is levied under Section 5638-1, General Code; and it appears that the corporation, although required to pay the tax, will, in doing so, be imposing the full burden of that tax on those whose property interests are taxed.

It is further argued, in effect, that the value of the interests of a depositor in the Society for Savings can never rise above the amount of his deposit unless the corporation goes into liquidation, that anyone by making a deposit can secure interests equal to that of an existing depositor having a deposit of the same amount, and that therefore a depositor's interests cannot be subjected to taxation at an amount in excess of the amount of his deposit.

This argument might be persuasive if it were true that the property interest of a shareholder of a corporation could not be taxed at an amount equal to the book value of his shares in the corporation where such book value ex-

ceeded the actual value of the shares. We do not believe that any such contention could or even would be made. The book value of shares of stock may be more or less than the value of such shares. It may be much more. *Opdyke* v. *Security Savings & Loan Co.*, 157 Ohio St., 121, 148, 105 N. E. (2d), 9.

On the other hand, as to a depositor in a corporation such as the Society for Savings, it is not likely that the total of the amount of his deposit plus the amount of the book [fol. 178] value of his ownership interest as a depositor (this total being the book value of all his interests in the corporation) will ever be much more than what he can withdraw in cash at any time. When taxed on that total, *i.e.*, the book value of all his interests in the corporation rather than only on the lesser withdrawable amount of his deposit, a depositor of such corporation is not exposed to as great a taxation hazard as is a shareholder of a bank, who may be taxed on the book value of his shares even though such shares have no withdrawable value and have a realizable market or even actual value very much below their book value.

Unlike in *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 51 L. Ed., 901, 27 S. Ct., 571, our statutes do not justify our reaching a conclusion in the instant case similar to that reached by the Iowa Supreme Court in that case, that the taxes are levied on the corporation. As hereinbefore pointed out, the property to be taxed under our statutes is "the capital employed * * * in" or "by" a financial institution, that is, the intangible property interests of ownership of the owners of the institution representing that capital, not the capital *of* the financial institution. The "taxes" here involved are "*levied* on * * * kinds and classes of intangible property * * * enumerated," including "shares in and capital employed by [not capital of] financial institutions"; and, as hereinbefore pointed out, the General Assembly clearly indicated an intention that it is the capital of the owners of the institutions and not of the institutions that is to be taxed. See Sections 5408 and 5412, General Code.

As we view it, the *Des Moines case* holds merely that the fact, that a bank may in effect reimburse itself from its shareholders on account of a tax levied against it on its net

worth, will not justify the conclusion that, in computing such net worth, it is unnecessary to exclude federal securities. Here, unlike in that case, the taxes are not levied [fol. 179] against the corporation on the capital or net worth of the corporation but are levied against the ownership interests of the owners of the corporation, whether or not such ownership interests are evidenced by shares or capital stock.

As stated on page 518 in the opinion in that case:

"The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another at his request can recover the amount from him. *National Bank* v. *Commonwealth*, 9 Wall., 353; *Lionberger* v. *Rouse*, 9 Wall., 468; *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 440; *Merchants Bank* v. *Pennsylvania*, 167 U. S., 461; *Cleveland Trust Co.* v. *Lander*, 184 U. S., 111. The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holding of stock, and an examination of them shows that in every case the tax was assessed upon the property of the shareholders and not upon the property of the corporation. There is nothing in them which justifies the tax under consideration here, *levied*, as has been shown, on the corporate property."

It may be observed that the *Des Moines case* involved "a tax * * * levied under a law * * * which provided that 'shares of stock of state * * * banks * * * shall be assessed to such banks * * * and not to the individual stockholders.'" At the same time, the statutes of that state expressly provided that shares of stock of national banks should be assessed to the individual stockholders.

That *Farmers & Mechanics Savings Bank of Minneapolis* v. *Minnesota*, *supra*, is not applicable appears from the following in the court's opinion:

[fol. 180] "The Supreme Court of Minnesota held that this section imposed * * * a property tax, and that the surplus *of*

savings banks as thus determined is taxable property. This construction is not questioned here; perhaps is not open to question." (Emphasis added.)

Likewise, the cases of *Missouri, ex rel. Missouri Ins. Co.*, v. *Gehner, Assessor, supra*, and *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals, supra*, each involved the levy of a tax against a corporation on part or all of the net worth of the corporation. As hereinbefore pointed out, the taxes in the instant case are not levied on any part of the net worth of the financial institutions but are levied on the interests of the owners of such institutions in the capital of such institutions, whether evidenced by shares of stock or not so evidenced.

The decision of the Board of Tax Appeals is reversed and the order of the Tax Commissioner is affirmed.

Decision reversed.

WEYGANDT, C. J., MIDDLETON, ZIMMERMAN and LAMNECK, JJ., concur.

STEWART, J., dissenting. I am unable to agree with the conclusion of the majority of the court with reference to the taxation of the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock.

Ever since Chief Justice Marshall's historic opinion in *M'Culloch* v. *Maryland*, 17 U. S., 316, 4 L. Ed., 579, both by judicial decision and legislative fiat a state can not levy a property tax on federal securities, no matter who may be the owner of them.

Section 5408, General Code, as stated in the majority opinion, deals with three distinct objects of taxation: (1) [fol. 181] "Shares of * * * stockholders in a financial institution * * * incorporated * * * the capital stock of which is divided into shares."

(2) "Shares of * * * stockholders in an unincorporated financial institution * * * the capital stock of which is divided into shares held by the owners of such financial institution."

(3) "The capital employed, or the property representing

it, in a financial institution the capital of which is not divided into shares, or which has no capital stock."

I entirely agree with the majority that the shares of a financial corporation may be taxed and that the value of the shares may be ascertained by adding the amount of the capital, the surplus or reserve fund, and the undivided profits, without any deduction of federal securities in those items. This is so because it has long been held that the shares of a financial institution are a property apart from the assets of the institution, and in Ohio the tax on such shares, although levied in the name of the institution, is really a tax on the owners of the shares, and Sections 5672 and 5673, General Code, provide for reimbursement to the financial institution from the shareholders for the payment of the tax assessed on the shares.

I likewise agree that a tax may be levied on the deposits in a financial institution for again, that tax is on credits which are owned by the depositors.

Where one has a deposit in a financial institution, the relation of debtor and creditor arises, and a deposit, therefore, is not an asset of the institution but is, indeed, a liability because the institution owes the amount of it to the depositor.

In Ohio the tax on a deposit is on property separate and apart from any assets of the bank and, although assessed in the name of the bank, it is really against the depositor, and in Sections 5673-1 and 5673-2, General Code, provision is made for reimbursement to the bank from the depositor [fol. 182] for the tax paid on the deposit.

However, in reference to the provision for taxing the capital employed, or the property representing it, in a financial institution, the capital of which is not divided into shares, or which has no capital stock, I am of the opinion that such a tax can not be assessed without first deducting federal securities which are a part of the property to be taxed. Such a tax, as stated in Section 5412, General Code, is on the aggregate amount of the capital, surplus, reserve fund, and the undivided profits. The tax is assessed against the financial institution itself and there is no provision for such institution to recover from any one the tax paid as

there is specifically made in reference to a tax on shares or deposits.

It is argued that the tax assessed against such an institution without shares is, in actuality, assessed against the owners of the capital, surplus, reserve fund, and undivided profits, and that such owners are the depositors in the institution.

Admitting that there is no way for the institution to obtain reimbursement from such depositors for the tax paid on the assets, yet it is said that the depositors really pay it because the tax creates a decrease in the assets of the institution in which they have intangible rights. It would not be contended that a tax could be assessed against the capital, surplus, reserve fund, and undivided profits of a bank with shares, without deducting any federal securities from the property assessed, and yet the same argument could be made to the effect that such a tax was against the shareholders because it would decrease the amount of assets in the bank, which they, as shareholders, own.

What depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution without shares?

[fol. 183] The majority opinion asserts that present depositors own it.

Why should one who becomes a depositor today own a share of the surplus and undivided profits of a savings institution, which have been built up by present long-time depositors and by great numbers of past depositors who have drawn out their deposits (and that is all they can get), but whose deposits have built up the surplus assets of the institution?

It seems to me that when it is said that the depositors own the capital, surplus, reserve fund, and undivided profits of a financial institution, it is going to be an impossible task to ascertain what depositors own such assets and in what proportions.

Where a deposit is made in a bank, the bank is a debtor of the depositor, and, assuredly, at least during the corporate existence of the bank, the depositor can receive nothing in excess of the actual deposit he made.

Assuming that the depositors do own the capital employed, or the property representing it, in a financial insti-

tution without shares, it seems to me that it would still be unlawful to assess a tax against such property without deducting any federal securities therefrom. A state cannot levy a property tax on federal securities, regardless of who owns them.

It is conceded in the majority opinion that the tax against the capital employed or the property representing it can not be assessed if such capital and property belong to the financial institution itself. In my opinion, the same inhibition against assessing the tax exists, where such capital employed or the property representing it is owned by any person or group of persons whether known or unascertainable. The ownership of the property is not essential. The vice in the tax assessment is in taxing property which includes federal securities, without the deduction of such securities.

[fol. 184] In the case of *Farmers & Mechanics Savings Bank of Minneapolis* v. *State of Minnesota*, 232 U. S., 516, 58 L. Ed., 706, 34 S. Ct., 354, it was held, in paragraph three of the L. Ed. headnotes:

"A state, in taxing as credits the surplus of a savings bank, ascertained by deducting from its assets the amount of its deposits and other accounts payable, must leave out of the computation of its assets bonds issued by territorial municipalities which are exempt from taxation as the obligations of an agency of the federal government."

That case concerned a savings bank having no capital stock and taxable under a Minnesota law which provided for ascertaining the surplus remaining after deducting from its assets (other than real estate which was separately assessed) the amount of the deposits and all other accounts payable, the surplus being taxed as "credits."

The Supreme Court of Minnesota had held that the state law imposed not a franchise but a property tax and that the surplus of the savings bank as thus determined was taxable property.

In the opinion Justice Pitney said:

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings

bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black, 620, it was held that the state of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital ivested in the stocks, bonds, or other securities of the United States not liable to [fol. 185] taxation by the state. And see *Bank Tax Case*, 2 Wall, 200; *Home Savings Bank* v. *Des Moines*, 205 U. S., 503, 509.

"It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

There is no claim anywhere in the majority opinion here that the imposition of the tax concerned anything but a property tax, so it seems to me that the decision of the *Farmers & Mechanics Savings Bank case, supra*, is dispositive of the question before us.

In *People ex rel. Bank of Commerce*, v. *Commrs. of Texas*, 67 U. S., 620, 17 L. Ed., 451, it was held, in the L. Ed. headnotes:

"The stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is not subject to state taxation.

"It makes no difference that the tax is on the aggregate of the tax payer's property, and the stock is not taxed by name."

If the capital stock of a bank with shares can not be taxed without deducting any federal securities, how is it legally possible to so tax such capital stock of a savings bank without shares?

It can be much more cogently argued that the tax assessed against the capital of the bank with shares would be borne more acutely by the shareholders than would the tax as-

sessed against the capital of the bank without shares be borne by its depositors.

It seems to me that taxing the capital employed, or the property representing it, and ascertaining its value at the aggregate amount of the capital, the surplus or reserve fund, and the undivided profits, without deducting therefrom any federal securities contained therein, is repugnant to the [fols. 186-189] Constitution of the United States, regardless of who the owner of that property may be, and that a judgment upholding such procedure is in direct conflict with the declaration of the Supreme Court of the United States in the *Farmers & Mechanics Savings Bank case, supra.*

It must be remembered that the present case involves the imposition of a tax and not a claim for exemption from one. In such a situation, the law must be strictly construed against the taxing authority,

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[fol. 190] IN THE SUPREME COURT OF OHIO

JUDGMENT—March 10, 1954

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein.

It is further ordered and adjudged that the order of the Tax Commissioner be, and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellee his costs herein taxed at $,
for which execution is hereby awarded.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

IN THE SUPREME COURT OF OHIO

ORDER DENYING REHEARING—March 31, 1954

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and it hereby is, denied.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 204

SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND, Appellant,

vs.

JOHN W. PECK, TAX COMMISSIONER

Appeal from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—October 14, 1954

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief as *amicus curiae*.

Mr. Justice Burton took no part in the consideration or decision of this question.